Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
	)	
Petition of USTelecom for Forbearance Pursuant	)	**WC Docket No. 18-141**
to 47 U.S.C. § 160(c) to Accelerate Investment in	)	
Broadband and Next-Generation Networks	)	

REPLY COMMENTS OF TEXALTEL TO PETITION OF AT&T SERVICES, INC. FOR FOREBEARANCE UNDER § 47 U.S.C. 160(c)

TEXALTEL

Charles Land
Executive Director
500 N. Capital of Texas Highway
Building 8, Suite 250
Austin, Texas 78746
(512) 320-0430

September 5, 2018

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
	)	
Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks	)))	**WC Docket No. 18-141**

REPLY COMMENTS OF TEXALTEL TO PETITION OF AT&T SERVICES, INC. FOR FOREBEARANCE UNDER § 47 U.S.C. 160(c)

TEXALTEL is a trade association that represents competitive telecommunications carriers[1] that operate in Texas. Many members provide service regionally and/or throughout the country. TEXALTEL members provide a varying array of services to their customers including basic local telephone service, prepaid services, and high-speed data services served over fiber and copper facilities and Voice over Internet Protocol services ("VOIP"). TEXALTEL members have a vested interest in ensuring an orderly and organized regulatory process to assure that substantive changes of regulatory rules and requirements that affect competitive landscape are made based on a complete, accurate, and fully considered record.

TEXALTEL appreciates the Commission providing the opportunity to provide comment in this proceeding.

[1] TEXALTEL's members include: Alpheus Communications, Bestline Communications, Grande Communications, Logix Fiber Networks, Meriplex Communications, TPX Communications (fka TelePacific Telecommunications) and West Telecommunications (fka Hypercube).

INTRODUCTION AND SUMMARY

TEXALTEL files these reply comments in response to the request for comment within the *Notice of the above captioned petition* and the comments filed by other parties. For the reasons stated herein, TEXALTEL strongly opposes the relief sought in USTA's petition.

The forbearance process is most properly used primarily to allow minor and/or narrowly tailored regulations to be waived when they would not be effective in a particular application with a particular company. This process does not provide appropriate vetting on complicated proposals, or proposals that have consequences far beyond those disclosed by the proponent.

USTA makes grandiose proposals that would change the competitive marketplace in dramatic fashion. As an example, TEXALTEL points to the long history associated with the Triennial Review as a proceeding where the Commission recognized the need for a full record before implementing substantial changes to unbundling rules and then modifying those rules in a tailored manner as the Commission deemed warranted by that record. USTA does not acknowledge the breadth of impact its requested relief would have on the industry as a whole and proposes a broad-brush solution to a complex and multifaceted issue. USTA's goal is simple: make an emotional plea while avoiding a rulemaking process that would create a full and detailed record.

TEXALTEL urges that the forbearance process is the wrong forum to consider the complex and broad issues that would permanently change the telecommunications marketplace and cease the effective application of unbundling and resale rules.[2]

More importantly, not only is forbearance the wrong forum to consider an industry

[2] Incompas at 2 (noting that "US Telecom filed to provide the information needed to determine the impact forbearance would have on competition in both retail and wholesale markets and on consumers, and thus has not met its burden to establish its *prima facie* case that it meets all of Section 10's requirements for forbearance.")

changing proposal, such as those proposed by USTA, USTA's proposals are so wrong substantively as to border on absurd. The industry is highly dependent on ubiquity – being able to reach customers at any location. Elimination of UNEs forces competitors to utilize Special Access or other services of ILECs, if the ILECs deem to provide them. Such "commercial offerings" are tremendously overpriced and/or are accompanied by volume and term commitments that are unreasonably burdensome and retard competition. The result is a tail wagging dog affect. Inability to meaningfully compete for the tail means you lose the entire dog as a potential customer or market.

BACKGROUND

The success of retail competition has largely stood on the shoulders of proper regulation of the wholesale marketplace to assure that incumbents, who maintain significant market power, do not abuse that power in order to harm and impair the development of competition within the retail marketplace. Such retail competition ultimately benefits consumers. Where Congress sought divesture of the "wires" in the electric industry, telecommunications deregulation, ILECs avoided such divestiture allowing them to retain ownership and control of all their facilities, including the "last mile" for which it was unlikely there would be ubiquitous facility competition. Instead of divesture, Congress requires regulatory oversight to assure that use of these facilities is available to competitors on terms that promote competition where competition would be impaired without such access.

Forbearance pursuant to Section 10 of the Act[3] is required when it is determined that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulation are just, reasonable, and not unjustly or

[3] 47 U.S.C. § 151 *et seq.* (the "FTA" or the "Act").

unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[4] Moreover, as part of the public interest test, the Commission also must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[5] USTA's petition fails all three tests.

DISCUSSION

A. BURDON OF PROOF

The purpose of Section 251 of the FTA is largely to create a framework to support the development of robust and broad-based competition in communications markets. The preamble of the FTA states the purpose:

> [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunication technologies.[6]

The FTA was not designed to create competition limited to certain neighborhoods and business districts. It was not designed to create duopolies. The Commission effectively addressed the latter point in the *Qwest Phoenix Order*. In that docket, the Commission concluded that "regulatory parity" with a cable company just for the sake of "regulatory parity" is not a valid end of good policy. Instead, reasonable wholesale obligations on at least one party remain necessary unless there is sufficient competition to maintain a robust, competitive environment without continuing those obligations.

The Commission properly puts the burden of proof on the party seeking forbearance, i.e. the party that is seeking an exemption from the Commission's rules. USTA cannot meet that

---

[4] 47 U.S.C. § 160(a).
[5] 47 U.S.C. § 160(b).
[6] See Preamble, Telecommunications Act of 1196, Pub. L. No. 104-104, 110 Stat. 56 (1996).

burden for a number of reasons including that the rules themselves provide a means to lessen regulation were impairment to competition no longer would exist. The self-adjusting nature of the legislation and rules obviates any possibility that a broad, overreaching forbearance can be in the public interest. Not only does the law provide this self-adjusting mechanism based on impairment, but the Commission demonstrated its ability to utilize that means as part of the Triennial Review dockets.

B. FACTS DO NOT SUPPORT THE RELIEF SOUGHT BY USTA

Even if forbearance was the appropriate means for USTA to seek relief, which it is not, the facts – particularly given the lack of a full record in such a truncated proceeding – simply do not support the removal of existing unbundling or resale obligations.

1. USTA Improperly Draws an Erroneous Broad Brush to Data

As other parties have noted, USTA's use of broad and generalized numbers dramatically overstates the status of competition. It fails to disaggregate voice lines of an ILEC and ILEC-affiliated company. It fails to recognize where a VOIP line may ride on top of an unbundled loop that would no longer be available should its requested forbearance be granted. Further, as discussed by INCOMPAS and others, it fails to show the distribution of lines or facilities amongst companies so that a proper market power evaluation can be made. As the Commission is well aware and has the Department of Justice (DOJ) has long acknowledged, it is important not only to see the market share of one company seeking relief but also other large providers for a duopolistic market is far different than a competitive one. USTA avoids this fact for two primary reasons. First, a more detailed review of the data would not support its overreaching and inappropriate relief requests. Second, a more detailed review in and of itself highlights the inappropriateness of USTA's one-size-fits-all forbearance request. Facts simply are not the same in all locations. As this Commission determined as part of the Triennial Review dockets, nonimpairment requires a fact-specific analysis. Such a fact-specific analysis is exactly what USTA and its members seek to avoid.

Even where USTA appears to offer[7] "localized" data, USTA fails. As other parties have shown, use of Census Block Group (CBG) data does not provide the localized granularity to determine if there are multiple ubiquitous competitors.[8] The Commission was faced with this question in the Triennial Review dockets and determined that tests based on customer location and density of lines in a geographic area served by a switch are more relevant for a nonimpairment determination. USTA fails to provide such necessary data.

2. USTA Improperly Attempts to Conflate Voice Lines and Facilities

USTA places much of its emphasis on the lessening of "ILEC switched voice lines" in the marketplace.[9] What USTA does not effectively do is provide a meaningful rationale for why this is a key data point for the relief it seeks. Moreover, to the extent that real world data supports lessening unbundling obligations, its member ILECs can utilize that data in a nonimpairment argument pursuant to Section 251(c). The fact that USTA seeks to side-step a true analysis is telling.

First, the data provided by USTA is not meaningful. USTA does not provide full market

---

[7] See e.g. Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access Services, WC Docket No, 05-25, RM-10593, para 40 (filed Jan. 27, 2016) as referenced in Opposition of Incompas Et. al. at 59.

[8] See e.g., Incompas at 3. See also Incompas at pp. 20-24 (Summarizing current regulatory rules including results from the TRRO that focus the unbundling impairment analysis on central office characteristics in lieu of census block groups [CBGs]).

[9] USTA Petition at 7-15.

data. It does not acknowledge which lines simply shifted from one mode to another within its same member companies and their affiliates. An ILEC "circuit-switched" line that now is an ILEC, or ILEC affiliate "packet-switched (VOIP) line or an ILEC/ILEC affiliate "circuit-switched-wireless" line significantly affects a discussion on whether there has been a sufficient minimization of market power to find that removing unbundling and resale obligations is in the public interest. This is true in a macro sense and is more obviously true in a localized determination where a customer may have limited options other than an ILEC and its affiliate.

Second, the USTA's myopic focus on ILEC-switched lines fails to consider the obvious fact that competitor voice services can and are provided over unbundled loops.[10] In fact, the Commission's own DS1 unbundled loop, nonimpairment test includes that fact as part of the test calculation, i.e. the FCC rule counts an unbundled DS1 loop as equating to twenty-four (24) business voice lines.[11]

To the extent voice line competition is dependent on unbundled loops and/or transport,[12] the data relied upon by USTA would be reversed if USTA obtains the relief it seeks. Such reversal would not be in the public interest.

3. USTA Tellingly Assumes Prices Will Increase if its Petition is Granted

USTA's own proposed transition plan is telling. USTA assumes there will we price increases and builds those increases into its transition plan. Why? UNE rates are cost-based and include significant profit margins in the rates (Total Element Long Run Incremental Cost or

---

[10] See e.g., Incompas Initial Brief Declarations Socket Decl. paras. 25-26.

[11] 47 CFR 51.5. (Defining a Business Line at subpart (3) where it states "a DS1 line corresponds to 24 64 Kbps-equivalents and therefor to 24 'business lines'."_

[12] See e.g., Incompas Initial Brief Declarations IdeaTek Decl. p. 4 and Digital West Decl. p. 10.

TELRIC).[13] These TELRIC rates already incorporate the profits one would anticipate in a competitive market. Certainly, a competitive market might achieve some rates that are different from what was found by a particular state regulator. Some prices might go up. Some prices might go down. But, if we are moving from TELRIC rates to prices determined in a truly ubiquitous competitive market, there should not be a broad increase in prices. Instead, USTA by incorporating this assumption demonstrates that USTA does not believe that to be true, ubiquitous competition exists.

To further this point, dramatic new price increases on top of past price increases are moving forward. As just one example, AT&T published this accessible letter with DS1 price increases since the initial comment window.[14]

---

[13] 47 CFR 51.505(b) (defining Total Element Long Run Incremental Cost, (TELRIC).
[14] AT&T Accessible Letter CLECAM 18-098 (August 22, 2018).

Accessible

Date: August 22, 2018

Number: CLECAM18-098

Effective Date: October 27, 2018

Category: Resale

Subject: (RATE CHANGES) Correction - DS1 Service - MI (18MW17237)

Related Letters: CLECAM18-089

Attachment: NA

States Impacted: Michigan

Response Deadline: NA

Contact: Account Manager

Conference Call/Meeting: NA

This is to advise the effective date for the proposed DS1 Service rate changes communicated in CLECAM18-089 has been changed to October 27, 2018.

The current and proposed rates shown below are retail rates and the applicable resale discount will apply.

Product	USOC	Current Retail Rates	Proposed Retail Rates
Local Distribution Channel - Zone 1	TZ4X1	$918.00	$1,147.00
Local Distribution Channel - Zone 2	TZ4X2	$977.00	$1,221.00
Local Distribution Channel - Zone 3	TZ4X3	$1020.00	$1,275.00
Channel Mileage Termination - Zone 1	CZ4X1	$307.00	$383.00
Channel Mileage Termination - Zone 2	CZ4X2	$307.00	$383.00
Channel Mileage Termination - Zone 3	CZ4X3	$307.00	$383.00
Channel Mileage - Zone 1	1YZX1	$103.00	$128.00
Channel Mileage - Zone 2	1YZX2	$103.00	$128.00
Channel Mileage - Zone 3	1YZX3	$103.00	$128.00

These increases, which are multiples in excess of unbundled facility prices, are what AT&T seeks even while unbundling rules are in place to "retard" such increases. Such increases alone show that competitive access is not ubiquitous, and robust competition has not yet been achieved. Without those rules, it is likely such competition never will and USTA members will continue and likely accelerate their price increases.

Ironically, USTA effectively seeks forbearance from having to show that the relief it seeks would not result in harm to the public interest. The TRRO, for example, went through the public interest analysis and found that incumbents can be relieved of unbundling obligations where that removal is in the public interest. The Commission created tests to evaluate when a condition of “nonimpairment” exists, i.e. when the public interest is not impaired when an unbundling obligation goes away. In this context, what USTA is effectively asking for is a “public interest” determination under Section 10 that a finding in the “public interest” review for nonimpairment is not in the “public interest”. Such a convoluted and fractured argument cannot stand.

4. It is the “Ubiquity” Stupid

Paraphrasing the political quote on the economy, the biggest challenge to being a successful competitor in the telecommunications market place is ubiquity. Especially for larger and multi-location customers, a competitor needs to be able to cover the customer’s footprint or be shut out from the entire customer. Must a competitor say “no” to customers seeking its services that are “off net”? Must it say “no” to multi-location customers who could be a huge account for the competitor because one of its satellite operations are “off net”? Must it say “no” to a long term valued customer who moves to an “off net” location? If it says “no” to any of those questions, the harm to the competition becomes apparent.

USTA would force competitors to say “no” or utilize overpriced special access, which the accessible letter above shows are increasing to even more egregious heights to reach these “off net” locations. These “off net” customers will have to pay substantially higher prices because of the limited last mile choices available to competitors or be captive to the ILEC. Even as competitive networks have grown under the current system, there are still many locations where the ILEC is the only choice. We fully understand the urge of the ILECs to reap monopoly profits from the areas where they remain the primary choice. But, the obvious public policy answer must be “yes” to customers seeking services and “no” to USTA’s forbearance request.

CONCLUSION

TEXALTEL urges the Commission to deny USTA's request for forbearance. The current rules already contain a process tailored to have unbundling obligations mirror where they are consistent with the public interest. The structure of the FTA is to maintain sufficient wholesale obligations where they appropriately support ubiquity of retail competition. The impairment analysis employed by the FCC in prior proceedings demonstrates the Commission has the capacity to develop rules to tailor those unbundling rules such that those obligations can be removed where competition will thrive without them while assuring that the public interest will be served by maintaining those obligations where localized conditions demonstrate they remain appropriate. USTA seeks to fatally wound that delicate balance.

Thank you for your consideration of these comments.

Respectfully Submitted,

TEXALTEL

By: /s/ Charles D. Land

Charles D. Land, P.E.
Executive Director

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

<u>AFFIDAVIT OF CHARLES D. LAND</u>
<u>ON BEHALF OF TEXALTEL</u>

Before me, the undersigned authority, on this 5th day of September, 2018, personally appeared Sheri Hicks, who, upon being duly sworn, states the following:

1. My name is Charles D. Land. I am over the age of 21, of sound mind, and am competent to testify as to the matters stated herein. I am the Executive Director for TEXALTEL. I have personal knowledge of the facts contained herein.

2. The facts contained in these comments and related attachments are accurate. Moreover, I have personal knowledge as to this information through the due course of my duties in my capacity as TEXALTEL's Executive Director.

Further Affiant sayeth not.

__________/s/_________________________
Charles D. Land

Sworn to and subscribed to before me this 5th day of September 2018, to certify which witness my hand and seal.

_________/s/__________________________
Notary Public in and for the State of Texas
My Commission expires: ________